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United States of America

In the

Supreme Court of the United States

No. 185

OCTOBER 1949 TERM

In the Matter of
THE ELLESS COMPANY, a Michigan corporation,
Debtor

FRANK W. BLAIR, LOUIS H. CHARBONNEAU, and
LUCIUS TETER, Trustees under Trust Agreement
for Stock of Whittier Corporation
dated as of May 1, 1948, and
WHITTIER CORPORATION and HARRY W. JONES
and HAROLD M. SHAPERO,
Petitioners,

vs.

JOHN C. FINAN,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN RE SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

OPINION OF COURT OF APPEALS

Under this heading respondent questions the accuracy of our statement in the petition for writ of certiorari that

the Court of Appeals held that the District Court had jurisidction to determine the rights of the voting trustees and voting trust certificate holders to vote the stock represented by voting trust certificates. Their attack on this statement is based on two theories:

(1) that the court did not direct that an injunction run against the certificate holders. This may very briefly be answered by pointing out that an injunction which restrains a trustee from doing an act which the trustee under Michigan law has a right to do (voting stock standing in his name on the record date) certainly deprives a beneficiary of the trust of the statutory right to continue to have the stock voted by the trustee without further act on the part of the beneficiary as effectively as though the injunction by its terms restrains the beneficiary from having his stock voted by the trustee.

(2) That an injunction restraining the trustees from voting stock of the beneficiaries does not deprive the beneficiaries of voting rights since the beneficiaries may withdraw their stock from the trust and vote it directly themselves. But merely because under the Michigan law stockholders may vote stock directly by withdrawing it from the trust is no answer to the fact that an injunction which restrains the trustees from voting stock in the trust deprives the beneficiaries of one right given them by the Michigan statute, i.e., the right to leave the stock with the trustees and have them vote it.

Under the Michigan statute beneficiaries have two ways of having their stock voted after termination of the trust. They can

(1) leave the stock in the trust and have it voted by the trustees or

(2) they can withdraw it from the trust and vote it themselves.

The mere fact that the opinion of the Court of Appeals does not deprive certificate holders of this second right is certainly no proof that the court has not deprived them of the first of these two rights.

THE POWER OF THE DISTRICT COURT TO TERMINATE THE TRUST

Respondent attempts to justify the action of the District Court in terminating the trust, and of the Court of Appeals in upholding the termination, on the theory that this was the court's own trust, that the voting trustees were officers of the court, that their control and supervision over the corporation by the exercise of their voting rights are the supervision and control of the court and that the court has the right to terminate its trust and its supervision and control when the court determines that such supervision and control are no longer needed. No authority is cited in support of the claim that this voting trust is the court's trust and is the court's means of supervising and controlling Whittier Corporation.

On pages 12 and 13 of our brief in support of the petition for writ of certiorari we discussed three cases which directly refute the idea that voting trustees provided for in a plan of reorganization are officers of the court or are subject to the control of the court. These three cases are brushed off by respondent on pages 12 and 13 in a manner which indicates plainly that there is no authority to the contrary. Moreover, though the precise language may not have been used, the following cases decided by the Circuit Court of Appeals of the Second Circuit show quite plainly that the court did not consider a voting

trust provided for in a plan of reorganization as the court's own trust or that the court had any right to control the actions of the trustees thereunder.

In re Flatbush Ave. v. Nevins Street Corp., 133 Fed. 2d 760 where the court held it did not have jurisdiction to determine rights under a purported extension of a voting trust agreement entered into pursuant to a plan of reorganization.

In re Ambassador Hotel Company, 124 Fed. 2d 435 where the court held that it could not determine the right of certificate holders to withdraw their stock from a ten year closed trust even though a statute enacted subsequent to the adoption of the plan of reorganization pursuant to which the voting trust was created limited such trusts to five years.

The decisions of the court of the Second Circuit on these voting trust cases is entirely consistent with its determination of the question of reserved jurisdiction in other decisions of the same court, to-wit: *Reese v. Beacon Hotel Corp.,* 149 Fed. 2d 610; *Tower Hotel Corp. v. Lafayette National Bank,* 148 Fed. 2d 145; *North American Car Corp. v. Peerless Corp.,* 143 Fed. 2d 938. While some of these cases were cited in the opinion of the Court of Appeals and in the opinion of the District Court in support of the court's right to terminate the trust, the fact is that the decisions of both of the lower courts in this case are directly opposite to the principles announced in all of these cases.

We are not going to trespass on the time of the court to argue whether the decisions of the Second Circuit are correct or whether the decisions of the lower courts in

this case are correct. Mindful of the rule of this court setting forth the type of questions which this court will consider on certiorari, we are contenting ourselves with pointing out at the present time that there is a real and direct conflict between the decision in this case and the decisions of the Court of Appeals of the Second Circuit. The only way in which it can be argued that there is no such conflict is to advance the theory that the question of whether or not trustees under a voting trust created pursuant to a plan of reorganization are officers of the court and that the trust is the court's own trust was not advanced in the cases in the Second Circuit. If this be so (and we don't think it is) then the lower courts in this case have "decided an important question of Federal Law which has not been but should be settled by this court." If the bankruptcy court is to have the right to control a reorganized corporation through the device of a voting trust, such right must come from the Bankruptcy Act itself and if the Bankruptcy Act should be so construed, this court should say so in unmistakable language for the guidance of parties in the future, but if the court does so it will at the same time be required to overrule the decisions from the Second Circuit which we have cited.

THE PROPRIETY OF THE INJUNCTION ORDER BY THE COURT OF APPEALS

The argument of respondent on this feature of the case seems to be that Section 34 of the Michigan Corporation Code is permissive rather than mandatory ("may" vote) and that the statute is not applicable here because of the terms of the agreement and because this was the court's own trust. The statute is permissive in the sense that it does not require the trustees to vote but it is not permissive in the sense that it requires that such power be

contained in the trust agreement. The statute after authorizing the execution of the agreement and the transfer of shares to the transferees provides that they "may vote upon the shares so transferred during the period in such agreement specified *and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same.*" The statute so plainly confers the right to vote after termination that it is difficult to see how it could be construed otherwise. But if the statute needs any construction, such construction should come from the Michigan Supreme Court and in the absence of such construction if the court had any doubt that it should be applied literally, it should have withheld its determination on the granting of an injunction pending the bringing of appropriate proceedings in the Michigan court for construction of the statute.

Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (484);
Railroad Commission v. Pullman Co., 312 U. S. 496 (500-502);
American Federation of Labor v. Watson, 327 U. S. 582.

TERMINATION OF THE TRUST WITHOUT NOTICE

The brief of respondent on this point does not answer the objection we have made under this heading. We do not dispute the fact that notice was given to certificate holders on the original hearing on Finan's petition asking for a determination that the extension of the voting trust was invalid. Our complaint is about the action of the court in terminating the trust on the court's own motion pursuant to purported reserved jurisdiction which we claim is void

without any opportunity to trustees, certificate holders, stockholders or anyone, to be heard on the propriety of the proposed action. We respectfully submit that the authorities cited on pages 14 and 15 of our brief in support of the petition for writ of certiorari demonstrates conclusively that such action on the part of the court was a deprivation of property without due process of law.

Respectfully submitted,

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